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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF OF THE STATES OF VERMONT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MONTANA, NEW YORK, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA AND TENNESSEE, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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INTEREST OF THE AMICI CURIAE

The amici States have at least two significant interests in opposing the petitioners' call for heightened scrutiny of what are essentially state and local economic and land use planning decisions. First, the power of eminent domain is most commonly exercised by State and local governments and the States thus bear primary responsibility for balancing the public good with the rights of individual property owners. The amici States accordingly share an overarching interest in protecting their ability to make policy decisions that will best serve the economic, social and environmental interests of their citizens without additional, unnecessary judicial review under federal law. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (public use determinations made by state legislatures entitled to same deference afforded Congressional determinations).

Second, heightened scrutiny of public use determinations under federal law will seismically shift takings litigation from the predominant and proper venue, the state courts, into the federal courts, upsetting an appropriate federal-state balance in the process. The amici States have a strong interest in preserving the primary role of the state courts in reviewing state and local land use decisions. State courts have been, and will continue to be, responsive to local economic conditions, to the rights of local landowners, and to the legal traditions of the respective States. But if this Court departs from its established deferential review of public use determinations, state and local governments will face increased costs and delays associated with additional layers of judicial review – including the likelihood of litigation in multiple forums and the unpredictable risk of liability for attorneys' fees.

The change in federal law sought by petitioners would also unnecessarily disrupt the evolution of public use law in the various States. The States, through their constitutional provisions, statutes, and state court decisions, have developed different approaches to takings law and public use determinations that reflect the political, legal, and economic circumstances of each State. Consistent with our federalist system, the amici seek to preserve the ability of the States to experiment in this area free from the burden of heightened judicial review of the purpose of every proposed taking in federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question posed by this case is whether the Court will adhere to its rulings in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) and *Berman v. Parker*, 348 U.S. 26 (1954), or reverse those decisions and abandon the established practice of deferring to determinations of public use made by federal, state, and local governments in connection with the exercise of eminent domain. Although petitioners do not ask for *Berman* or *Midkiff's* reversal, and assert that those cases are distinguishable, *see* Pet. Br. 24-26, the outcome they seek in this case cannot be reconciled with *Midkiff's* central holding, which is largely drawn from the Court's earlier decision in *Berman*: the "public use" requirement of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers," and the exercise of the eminent domain power will therefore be upheld if it "is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 240-41. As Justice Kennedy observed more recently, writing for the Court in a case that reaffirmed *Midkiff* and *Berman*,

exercises of the condemnation power are constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992).

Amici States urge this Court to reject petitioners' arguments and reaffirm the rule of deference set forth in *Midkiff* for three principal reasons. First, a departure from the rational basis standard is contrary to precedent and unnecessary in the context of eminent domain. The Takings Clause of the Fifth Amendment is unique in the National Constitution for its unequivocal requirement that the government pay "just compensation" to those whose property is taken for a public use. U.S. Const. amend. V. The "weighty demand of just compensation," *Midkiff*, 467 U.S. at 245, serves both as an independent limitation on the use of the eminent domain power and as a guarantee of fair treatment to those affected by a taking. Heightened scrutiny, which is typically employed where the nature of government action suggests a greater risk of improper motive or abuse of power, makes no sense here.

Second, if the Court departs from the rational basis standard and imposes some form of heightened scrutiny as a matter of federal takings law, state and local governments – and the federal courts – would experience an upsurge in federal takings litigation. Plaintiffs have little incentive under current law to seek separate review of the public use issue in federal court, because, as the Sixth Circuit recently noted, plaintiffs in the typical case have "virtually no chance" of success under the deferential *Midkiff* standard. *Montgomery v. Carter County*, 226 F.3d 758, 768 (6th Cir. 2000). But that would change, and change dramatically, if this Court adopted the "reasonable

certainty" standard advocated by petitioners, or any other form of heightened scrutiny. Plaintiffs would then have great incentives to pursue litigation in multiple forums, including challenging the public use issue in federal court while litigating other matters in state proceedings. As a result, state and local governments in particular would face increased litigation costs, more delays attributed to court fights, and the potential for crippling attorneys' fee awards in actions brought under 42 U.S.C. § 1983.

Third, the dramatic change in federal law sought by petitioners would short-circuit the evolution of public use law in the state courts and unnecessarily impose a uniform federal rule in an area that has traditionally been governed by state law. Petitioners' claim that the "sky will not fall," Pet. Br. 48, if this Court rules in their favor is ironic, because the more accurate and relevant point is that the sky is *not* falling under present law. State courts have not hesitated to place limits on the use of the eminent domain power by state and local governments and a number of those courts (guided by a combination of state constitutional provisions, state statutes, and decisional law) impose a more stringent public use standard than federal law requires. Consistent with our federalist system, public use law varies among the States and the state courts have the flexibility to tailor their review to local conditions. But the willingness of state courts to act and the relatively frequent success of plaintiffs who bring public use challenges in state court show that no change in federal law is needed here. Amici States urge this Court to allow our federalist system to work and to refrain from imposing a more stringent federal standard that would prevent the States from adapting public use law to local needs.

I. Petitioners essentially ask this Court to reverse its public use precedents and apply heightened scrutiny to determinations of public use, a result that is least appropriate where the government must provide full and fair compensation to persons injured by its actions.

In their effort to overturn established takings law, petitioners ignore a basic truth: federal, state, and local governments routinely take actions to promote economic development in the public interest, even though those actions may benefit some persons while imposing costs on others. Except in very limited circumstances, this Court defers to the government's view of the public interest and upholds such actions – including taxes, subsidies, and market regulation and deregulation – so long as they are rationally related to a legitimate government purpose. *See, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978) (upholding state regulation of petroleum industry and emphasizing that courts do not sit as "superlegislatures" to evaluate the wisdom or "ultimate economic efficacy" of such legislation). Here, however, petitioners seek to impose a different, more exacting standard – either that economic development, however that should be defined,[1] cannot be a legitimate government purpose, Pet.

[1] Although petitioners urge the adoption of a rule prohibiting any taking for the purpose of economic development, they offer no definition of the term, but instead refer alternatively to "private business development," Pet. Br. 9, "economic development," *id.* at 10, and "private development," *id.* at 11. The eminent domain power has long been used, however, to aid business development and promote economic growth. Governments have taken land for mills, railroads, roads, and public works and utilities – all of which contribute to economic development. *See, e.g., Hairston v. Danville & Western Ry. Co.,* 208 U.S. 598, 608 (1908) (approving condemnation of land to construct railroad spur designed to meet demands of business); *Head v. Amoskeag Mfr. Co.,* 113

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Br. 11-12, or that courts must second-guess the political branches and decide whether a particular form of economic development is "reasonably certain" to benefit the public, Pet. Br. 27-28. Although petitioners carefully avoid the term "heightened scrutiny," that is unquestionably the standard they wish this Court to apply in all takings cases. But neither precedent nor logic supports this result.

To begin with, the Court squarely rejected this approach in both *Midkiff* and in its earlier decision in *Berman*. Although petitioners try to distinguish the facts of *Midkiff* and *Berman* from this case, they entirely ignore the legal underpinnings of the two decisions. *See Midkiff*, 467 U.S. at 239-43; *Berman*, 348 U.S. at 31-36. In both cases, the Court rejected any special understanding of the term "public use" in the Takings Clause and instead equated the public use requirement with the government's police powers. *See Midkiff*, 467 U.S. at 240 ("'public use' requirement is thus coterminous with the scope of a sovereign's police powers"); *Berman*, 348 U.S. at 33 (where object is within authority of Congress, "the right to realize it through the exercise of eminent domain is clear") Notably, in *Berman*, the Court rejected precisely the kind of

U.S. 9, 16-19 (1885) (describing Mill Acts in numerous States that permitted mill owners to flood land belonging to others for mechanical and manufacturing purposes); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-called "Takings Clause,"* 53 Hastings L.J. 1245, 1254 n.28 (2002) (noting, in nineteenth century, "widespread use of statutes designed to delegate the state's eminent domain power to private interests for the creation of a wide variety of manufacturing projects designed to achieve desirable economic ends"); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 Nat. Resources. J. 59, 71-75 (Winter 1996) (describing early Mill Acts as designed to promote economic benefit derived from mills).

bright-line rule that petitioners seek here, noting that attempting to define the reach of the police power is "fruitless" in part because the "purposes of government" are "neither abstractly nor historically capable of complete definition." *Id.* at 32. The role of the courts in deciding whether a taking serves a public purpose is "extremely narrow," because the legislature, not the courts, must be "the main guardian of the public needs to be served by social legislation." *Id.* As the Court put it, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.*[2]

In short, neither *Midkiff*, *Berman*, nor the Court's more recent decision in *National Railroad* can be reconciled with the result sought by petitioners in this case. In *Berman*, the Court approved condemnations in the District of Columbia that involved the "use of private enterprise for redevelopment," and declined to second-guess the determinations made by "Congress and its authorized agencies." 348 U.S. at 33. In *Midkiff*, the Court upheld the use of eminent domain to break up Hawaii's land oligopoly, not because there was any certainty that Hawaii's approach would accomplish its goals, but because Hawaii's purpose was legitimate and the means chosen were not irrational. *Midkiff*, 467 U.S. at 242-43. In so doing, the Court emphasized that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless

[2] In this case, the Connecticut Legislature determined that economic development was a public use. *See Kelo v. City of New London*, 843 A.2d 500, 519-520 (Conn. 2004) (construing state eminent domain statute and noting Connecticut Legislature's "declared public purpose of promoting economic development").

the use be palpably without reasonable foundation.'" *Id.* at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)). In *National Railroad,* the Court explicitly reaffirmed the rational basis standard and upheld Amtrak's effort to condemn a section of railroad track and convey the track to a different private owner. *See Nat'l R.R.,* 503 U.S. at 422-23. As in *Midkiff*, the Court considered only whether the public purpose was rational and declined to "make a specific factual determination whether the condemnation will accomplish its objectives." *Id.*

Petitioners disregard the core holdings of these cases when they suggest that the courts should closely scrutinize the purposes and likely success of challenged takings. Both of the alternative approaches advocated by petitioners – either prohibiting takings for economic development or requiring a showing of "reasonable certainty" that economic development will succeed – would greatly expand the "extremely narrow" role of the federal courts in reviewing public use determinations. Consistent with *National Railroad, Midkiff,* and *Berman*, the Court should reject petitioners' arguments and adhere to the rational basis standard for evaluating the public purpose of a taking.

Setting aside the Court's controlling precedents, heightened scrutiny is in any event unnecessary and inappropriate in this context because the Constitution already provides a special protection against takings. When the government takes private property for public use, it must provide just compensation to the owner. U.S. Const. amend. V; *see, e.g., Berman,* 348 U.S. at 36 (rights of property owners "are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking"). No such requirement applies in

numerous other contexts. The government may limit tort liability, grant tax breaks, and allocate public spending and resources in ways that benefit some market participants at the expense of others (including competitors, tort victims, and taxpayers) without providing any compensation at all. But the requirement of just compensation places an inherent limit on the use of the takings power.

Not surprisingly, petitioners make no effort to justify the application of heightened scrutiny where the government is already required to pay compensation for its actions.[3] Such a rule makes little sense. This Court consistently and appropriately defers to the government's view of the public interest in numerous contexts in which

[3] Petitioners suggest that courts should apply heightened scrutiny to takings for economic development purposes in part because eminent domain imposes personal costs on property owners that cannot be compensated. Pet. Br. 32-34. Amici in no way minimize the impact that takings may have on ordinary homeowners, some of whom may be unwilling to relinquish their property and move elsewhere. Petitioners' logic is flawed, however, for two reasons. First, the disruption a taking may cause a property owner is entirely unrelated to the purpose of the taking. A highway project may similarly require demolition of occupied homes. The fact that a taking of any kind may sometimes require a family to move out of its home does not support a rule limiting takings for economic development or any other specific purpose. To the contrary, this Court has held that "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Second, the same project may affect homeowners, real estate speculators, owners of vacant land, and owners of unattractive, unproductive property – in other words, property owners with varying degrees of attachment to their property. Nothing in this Court's precedents suggests that the constitutionality of a taking should depend on the property owner's personal interest in keeping his or her property, as opposed to the government's purpose in effecting the taking.

economic regulation results in uncompensated financial burdens. The rule of deference should, if anything, be stronger where the government must pay compensation for any injury it causes.

II. Any departure from the deferential standard set forth in *Berman* and *Midkiff* would entangle the federal courts in local land use disputes and foster additional and expensive litigation in takings cases.

Overruling *Midkiff* and *Berman*, and establishing heightened scrutiny for public use determinations, would unquestionably both increase the role of federal courts in local land use disputes and result in more time and money being spent on takings litigation. Under current law, takings cases typically begin in state court and most remain there. *See infra* note 5. This Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requires as much. Under *Williamson County*, a plaintiff must seek compensation for a taking through available state channels before seeking recourse in federal court. *Id.* at 194-95. Moreover, where a plaintiff asserts a regulatory taking, the plaintiff must "ripen" the takings claim by obtaining a final decision from the appropriate state or local agency about the potential use of the property at issue. *Id.* at 186, 190-94. Thus, state courts typically determine whether a taking has occurred and, if so, how much compensation is due.

Public use challenges are different, however. Most of the lower federal courts that have addressed the issue have held that a plaintiff may bring a public use challenge in federal court without first pursuing state remedies. These courts reason that a plaintiff challenging a taking

on public use grounds does not seek compensation but rather seeks to prevent the taking as unlawful regardless of compensation. Applying the "no exhaustion" rule of *Patsy v. Board of Regents*, 457 U.S. 496 (1982), several Courts of Appeal have allowed plaintiffs to bring actions in federal court under 42 U.S.C. § 1983 without first pursuing inverse condemnation proceedings or analogous remedies in state court. *See, e.g., Montgomery v. Carter County*, 226 F.3d 758, 766-68 (6th Cir. 2000); *Samaad v. City of Dallas*, 940 F.2d 925, 936-37 (5th Cir. 1991); *Theodorou v. Measel*, 53 Fed. Appx. 640, 643, 2002 WL 3168455, at *3 (3d Cir. Nov. 25, 2002) (unpublished opinion); *see also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 457-58 (7th Cir. 2002) (holding that state's inverse condemnation proceedings were futile where plaintiffs alleged taking for private use).

Although plaintiffs may bring public use challenges in federal court without resort to state remedies, under current law they are unlikely to do so. As the Sixth Circuit recently explained, plaintiffs in the "overwhelming majority of cases" have "virtually no chance . . . to make the extraordinarily difficult showing that a taking had no rational connection to a minimally plausible conception of the public interest." *Montgomery v. Carter County*, 226 F.3d at 768. Thus, plaintiffs are presently more likely to bring public use challenges, together with other related claims, in state courts. If this Court overrules *Midkiff*, however, and holds that federal law requires heightened scrutiny in public use cases, that will change. A heightened standard of review would make federal courts and federal claims more attractive and cause a significant increase in takings litigation, for at least three reasons.

First, litigation over the same land use dispute would likely take place in multiple forums. A plaintiff who challenges a taking on both public use and just compensation grounds may seek to litigate the public use claim in federal court and the compensation claim in an inverse condemnation proceeding in state court. The Fifth Circuit anticipated this precise problem in *Samaad*, where it held that the plaintiff's public use claim was ripe but dismissed the just compensation claim. *Samaad,* 940 F.2d at 936-37; *see also Montgomery v. Carter County*, 226 F.3d at 768 (noting that plaintiff did not appear to be seeking just compensation, but such claim was not ripe for federal review in any event). If the federal court rules against the plaintiff on the public use issue, but the plaintiff is dissatisfied with the compensation received, the plaintiff may be able to return to federal court to litigate the issue of compensation.[4] The likelihood of multiple plaintiffs in takings cases (such as here, where a development plan affects a number of properties) also increases the likelihood of litigation in multiple forums. Nothing would prevent plaintiffs from splitting their cases and intentionally filing separate lawsuits in state and federal courts to make the government's defense more difficult. Even

[4] Even if the doctrines of claim and issue preclusion place some limits on duplicative actions, individual plaintiffs may seek to preserve the right to litigate federal claims in federal court. *Cf. England v. Louisiana State Board of Med. Examiners*, 375 U.S. 411 (1965). This Court recently granted certiorari in a case from the Ninth Circuit that addresses whether the doctrine of issue preclusion bars property owners from relitigating takings claims in federal court where the same issues were necessarily resolved in state court litigation. *San Remo Hotel, L.P. v. San Francisco,* 364 F.3d 1088 (9th Cir. 2004), *cert. granted,* 73 U.S.L.W. 3162, 73 U.S.L.W. 3347, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-340).

though the government may ultimately prevail, it would be forced to absorb the delays and costs imposed by these additional layers of litigation – costs that would be a hardship for cash-strapped local governments and their taxpayers.

Second, plaintiffs would be likely to forum shop and employ public use litigation to delay government projects. As described in Part III, below, some state courts already review public use determinations under less deferential standards than required by *Midkiff*. Under current law, plaintiffs in those states have no incentive to seek federal court review of a public use claim, because state law is more favorable to their claims. If the Court adopted heightened scrutiny in this area, however, plaintiffs would have a significant incentive to litigate public use issues in both state and federal courts, in the hope that one court at least would rule in their favor. Even if they did not prevail on the merits, they might be able to create enough delay or increased cost to force the government to halt its plans.

Third, because federal claims may be brought under 42 U.S.C. § 1983, plaintiffs who bring federal public use claims would have the added incentive of seeking attorneys' fees – while state and local governments would be exposed to uncertain and potentially crippling liability for those fees. A fee award in protracted litigation can easily equal or exceed the amount in controversy in the litigation. If a federal court finds no public use for a particular project, a government may be obliged to use taxpayers' dollars originally set aside for the condemnation or development project to pay the attorneys' fees of the successful plaintiffs – with no benefit at all to the public. Even appealing an unfavorable district court decision would be risky, because fees would continue to mount. The risk of

liability for attorneys' fees might be manageable if government officials could look to clear, established legal standards for guidance, but any new rule adopted by this Court would lead to a period of uncertainty, possibly a prolonged period, as the lower courts interpret and apply the rule to varied factual circumstances. Thus, a heightened standard for public use determinations under federal law would impose significant new liabilities on state and local governments and inevitably have a chilling effect on the actions of government officials.

III. Instead of imposing a new public use standard as a matter of federal law, the Court should allow public use law to develop in the state courts, which already provide significant property rights protection and are better suited to respond to local needs and conditions.

There is no compelling reason to replace the longstanding deferential approach to public use determinations with a heightened federal standard. The state appellate courts, which presently handle the vast majority of public use cases,[5] have consistently applied public use law as a measured guard against potentially unconstitutional government encroachment on private property rights without hamstringing permissible state and local governmental efforts to improve society. Throughout their brief, the petitioners suggest that reaffirming this Court's longstanding, deferential public use standard "invites

[5] Authors Merrill and Wilk together identified 544 public use appeals decided between 1953 and 2003, of which 513 were decided by the state appellate courts and only 31 decided by the lower federal courts. *See* Merrill, *infra,* at 95-96; Wilk, *infra,* at 257-58.

abuse by governmental bodies and private parties." Pet. Br. 15; *see also* Pet. Br. 12 (arguing that the "unfettered sweep of the [Connecticut Supreme Court's] opinion places all home and small business owners at risk"). This sky-is-falling rhetoric cannot be squared with the actual situation in the courts.

To the contrary, the state courts have a strong history of responsible judicial review of public use claims under *Midkiff* and *Berman* as well as under more stringent standards imposed by state law. Since *Berman* was decided in 1954, the state courts have not been reluctant to reject the governments' proffered public uses in eminent domain proceedings. Between 1954 and April 2003, these courts have struck the government's proffered public use in over 16% of cases, meaning that more than one in six landowners prevailed. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 93-97 (1986) (surveying federal and state appellate "public use" cases decided between November 22, 1954 and January 1, 1986; finding state courts rejected government's public use claim in 16.2% of 291 cases); Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 Real Prop. Prob. & Trust J. 251, 258 (Summer 2004) (surveying appellate public use cases decided between January 1, 1986 and April 1, 2003; finding state courts rejected government's public use claim in 18% of 222 cases). This trend shows no sign of reversing. Between 2000 and early 2003, the state courts rejected the government's public use claims in roughly 20% of public use cases. *See* Wilk, *supra,* at 258. Recent public use decisions suggest that the state courts continue to effectively root out governmental plans serving no *bona fide* public use.

See, e.g., In re Robert W. Forrester, 836 A.2d 102, 105 (Pa. 2003) (opening private road is not public use).

Indeed, the petitioners' own brief is replete with examples of state courts identifying government public use claims that, under the relevant facts and circumstances, did not pass muster. *See, e.g.*, Pet. Br. 13, notes 7-9. The case of *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1 (Ill. 2002), shows that there is no call for the bright line test urged by the petitioners. There, the court first acknowledged that the proper test was whether a proffered public use fell within the government's police power. *Id.* at 7. Then, the court reconfirmed that whether a proffered public use is beyond the state's police power depends on the facts and circumstances of the particular case. *Id.* at 8. The court held that the particular condemnation and subsequent transfer, solely in response to the private transferee's expansion goals and designed to result in transferee's private profits, was not a public use. *Id.* at 10-11. Far from providing support for petitioners' arguments here, *Southwestern* illustrates the willingness and ability of state courts to continue distinguishing public uses from non-public uses on a case-by-case basis.

The role played by state courts in this area is consistent with our federalist system. State courts, no less than federal, are entrusted with protecting the rights established by the federal constitution. State courts are also best suited to applying the varied provisions of state law that govern public use determinations. Indeed, state constitutions, which for many years provided the only protection against non-federal takings, continue to be a source of rights and protections for property owners. As the Connecticut Supreme Court in this case acknowledged, courts in a number of States apply more restrictive public

use standards and have rejected takings for economic development. *See Kelo v. City of New London*, 843 A.2d 500, 532 (Conn. 2004) (noting that "courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow view of their public use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes" and collecting cases). And, as petitioners emphasize, the Supreme Court of Michigan also recently rejected a taking for economic development on state constitutional grounds. *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004) (holding that general economic development is not public use under the Michigan state constitution); *see also Georgia Dep't of Transp. v. Jasper County*, 586 S.E. 2d 853, 857 (S.C. 2003) (proposed marine terminal did not meet "restrictive definition of public use" under South Carolina's constitution).

Neither the willingness of state courts to grapple with these difficult issues, nor the varied approaches that result, should come as a surprise. This Court recognized almost one hundred years ago that the Fourteenth Amendment does not require a uniform approach to public use determinations and that "conditions vary so much in the states and territories of the Union that different results might well be expected." *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 606-07 (1908). As in *Hairston* and this case, federal court review is of course available, and hardly toothless – federal courts have found takings unlawful where no public use has been shown. *See, e.g., Montgomery v. Carter County*, 226 F.3d at 771-72 (suggesting that taking private driveway for public road solely for convenience of one neighbor is private taking); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237

F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (holding that unsupported and "entirely speculative" claim of future blight was not constitutionally sound public purpose). But the "great respect" given by this Court to the "judgments of the state courts upon what should be deemed public uses in that state" in *Hairston*, 208 U.S. at 607, is still warranted. State courts have ably succeeded in balancing the legitimate interests of the government and the public with the rights of property owners.

A departure from the deferential standard of *Midkiff* and *Berman* would undermine the role of state courts and unnecessarily impose new uniform federal rules in an area that calls for flexibility and attention to local needs. *See Hairston*, 208 U.S. at 606 (public use determinations have been "influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the public welfare, and the long-established methods and habits of the people"). This Court's perceptive edict that public use review is an inquiry that "must turn on its own facts," *Berman*, 348 U.S. at 32, has relevance here. Eminent domain undertaken for public uses such as economic development does not lend itself to the one-size-fits-all approach advocated by the petitioners. *See* Julius L. Sackman, 2A Nichols on Eminent Domain § 7.03[2][a], at 7-38 (3d ed.) (meaning of public use cannot be fixed in part because it "is to a great extent a local question"). Instead, it is a question of degree, necessarily turning on the local need for economic development, the locality's unique economic profile, local unemployment rates, industry composition, tax base, and a host of other very local factors better suited to legislative determination followed by deferential, yet individualized judicial review. That is exactly the type of responsible

judicial oversight afforded by the Connecticut Supreme Court in this case and by state courts across the country. *See Kelo*, 843 A.2d at 543 (recognizing importance of "facts and circumstances of the particular case" and noting that "decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster"); *see also Bailey v. Myers*, 76 P.3d 898, 902 (Ariz. App. 2003) (since there is "no mechanical formula" for determining public use, it should be decided on "case-by-case basis."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (casino development authority's attempt to take properties by eminent domain for declared purpose of providing parking, green space and roadway access to casino complex was not public use because, unlike bona fide economic development plan, primary consequence and effect of taking was to benefit casino owner). This case-by-case, and state-by-state, review of public use determinations is working and remains the best way to both protect property owners and promote the public good.

The Court should adhere to its precedents and allow public use law to continue to develop primarily in the state courts. Federal and state law already adequately protect property owners whose property is taken for "economic development" and myriad other public uses that benefit society. Against this backdrop, the Court should preserve the long-standing tradition of allowing the States wide berth in advancing public uses with the historical, limited but effective judicial oversight.

CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be affirmed.

Respectfully submitted,

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